

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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In the Matters of

Deployment of Wireline Services Offering
Advanced Telecommunications Capability,
et al.

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY
CC Docket Nos. 98-147, 98-11, 98-26, 98-32, 98-15, 98-78, 98-91,
and CCB/CPD No. 98-15 RM 9244

**PETITION FOR RECONSIDERATION OF
SBC COMMUNICATIONS INC.,
SOUTHWESTERN BELL TELEPHONE COMPANY,
PACIFIC BELL, AND NEVADA BELL**

SBC Communications Inc., Southwestern Bell Telephone Company, Pacific Bell, and Nevada Bell hereby seek reconsideration of two issues decided in the Commission's recent Memorandum Opinion and Order in these dockets (the "Advanced Services Order").¹

First, the Commission should immediately reconsider its determination that incumbent LECs must alter their networks by "conditioning" loops at the request of new entrants. That

¹Memorandum Opinion and Order, and Notice of Proposed Rulemaking, Deployment of Wireline Services Offering Advanced Telecommunications Capability, Petition of Bell Atlantic Corp. for Relief from Barriers to Deployment of Advanced Telecommunications Services, Petition of U S WEST Communications, Inc. for Relief from Barriers to Deployment of Advanced Telecommunications Services, Petition of Ameritech Corp. to Remove Barriers to Investment in Advanced Telecommunications Technology, Petition of the Alliance for Public Technology Requesting Issuance of Notice of Inquiry and Notice of Proposed Rulemaking to Implement Section 706 of the 1996 Telecommunications Act, Petition of the Ass'n for Local Telecommunications Services for a Declaratory Ruling Establishing Conditions Necessary to Promote Deployment of Advanced Telecommunications Capability Under Section 706 of the Telecommunications Act of 1996, Southwestern Bell Telephone Company, Pacific Bell, and Nevada Bell Petition for Relief from Regulation Pursuant to Section 706 of the Telecommunications Act of 1996 and 47 U.S.C. § 160 for ADSL Infrastructure and Service, FCC 98-188, CC Dkt Nos. 98-147, 98-11, 98-26, 98-32, 98-15, 98-78, 98-91 and CCB/CPD No. 98-15 RM 9244 (rel. Aug. 7, 1998).

requirement is flatly inconsistent with the Eighth Circuit's decision in Iowa Utilities Board v. FCC, 120 F.3d 753 (8th Cir. 1997), cert. granted on other grounds, 118 S. Ct. 879 (1998). In its Local Competition Order, the Commission imposed on incumbent LECs an obligation to provide their competitors, upon request, access to network elements superior in quality to what the incumbent provides to itself. See First Report and Order, Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, 11 FCC Rcd 15499, 15659 [¶ 314] (1996) ("Local Competition Order"). The Commission pointed specifically to loop conditioning as the prime example of its superior-quality requirement. Id. at n.680. On review, the Eighth Circuit squarely held that the 1996 Act does not permit the Commission to mandate such superior-quality access. Iowa Utilities Board, 120 F.3d at 813. In light of the Eighth Circuit's unambiguous ruling — a ruling that the Commission has not challenged in the pending Supreme Court case — the agency's attempt here to reimpose a loop-conditioning requirement is patently unlawful. The Commission should rescind it and do so promptly.

Second, the Commission should also reconsider its conclusion that section 706 provides the FCC with no independent authority to forbear from applying the Act's requirements on incumbent LECs. The Commission's understanding of section 706 is at odds both with the statutory structure and with Congress's objective that advanced telecommunications capability be rapidly made available to all Americans.

I. THE LOOP-CONDITIONING REQUIREMENT VIOLATES THE EIGHTH CIRCUIT'S MANDATE AND MUST BE RESCINDED.

The loop-conditioning requirements contained in the Advanced Services Order squarely conflict with the Eighth Circuit's holding in Iowa Utilities Board that the Commission lacks

authority to impose superior-quality requirements. Neither the Commission nor any other party sought review of that holding in its petition for certiorari, and, even if such review had been sought, that still would provide no basis for the Commission to ignore the square holding of the Court of Appeals. The Commission may not “disregard . . . the existing mandate of a federal court in a case in which the agency was a party litigant.” Iowa Utilities Bd. v. FCC, 135 F.3d 535, 540 (8th Cir.) (granting petition to enforce the Court’s prior mandate in light of FCC’s assertion of pricing jurisdiction under section 271), petition for cert. filed, 66 U.S.L.W. 3623 (1998). Accordingly, it has no proper alternative other than to vacate the Advanced Services Order insofar as it purports to require incumbent LECs to condition their loops for the benefit of requesting carriers.

Paragraph 53 of the Advanced Services Order states that incumbents must take “affirmative steps” to “condition” their local loops so that an entrant may provide advanced services over the loops. For instance, if “a carrier requests an unbundled loop . . . free of loading coils, bridged taps, and other electronic impediments, the incumbent must condition the loop to those specifications, subject only to considerations of technical feasibility.” Advanced Services Order ¶ 53. “The incumbent may not deny such a request on the ground that it does not itself offer advanced services over the loop.” Id.

The Advanced Services Order’s conclusion on this issue tracks the Commission’s earlier conclusion in its Local Competition Order. See 11 FCC Rcd at 15691-92 [¶¶ 380-382]. Indeed, the relevant portion of the Advanced Services Order cites and quotes heavily from the earlier order. See Advanced Services Order ¶ 53. And the Local Competition Order made entirely clear that the loop-conditioning requirement was a subspecies of the Commission’s broader

requirement that an incumbent LEC provide their competitors, upon request, with access to network elements that are higher in quality than what the LEC provides to itself. See 11 FCC Rcd at 15659 [¶ 314].

Indeed, the Commission specifically singled out loop conditioning as a paradigmatic illustration of its superior-quality requirement. The Local Competition Order offered, as an “example” of the superior-quality requirement, an incumbent LEC’s obligation to “provide local loops conditioned to enable the provision of digital services (where technically feasible) even if the incumbent does not itself provide such digital services.” Id. at 15659 n.680 (emphasis added).

On review of the Local Competition Order, the Eighth Circuit held that the Commission lacks authority to impose such superior-quality obligations. See Iowa Utilities Bd., 120 F.3d at 813. The Court of Appeals explained that “subsection 251(c)(3) implicitly requires unbundled access only to an incumbent LEC’s existing network — not to a yet unbuilt superior one.” Id. Section 251(c)(3) “does not mandate that incumbent LECs cater to every desire of every requesting carrier,” even if the incumbents will be “compensated for the additional cost involved in providing superior quality interconnection and unbundled access.” Id. Relying on this analysis, the Court of Appeals vacated the specific Commission rule (47 C.F.R. § 51.311(c)) that purported to require incumbents to provide such superior access to network elements upon request. See 120 F.3d at 819 n.39.

In light of the Eighth Circuit’s holding, there can be no serious dispute that the loop-conditioning portion of the Advanced Services Order must be reconsidered and rescinded. The dispositive points here are both simple and irrefutable: (1) the Eighth Circuit has held that the

Commission may not impose superior-quality obligations, and (2) the Commission itself frankly and unequivocally stated (when it believed it possessed the authority to impose such duties) that loop conditioning is an aspect of the subsequently invalidated superior-quality requirement. That should be the end of the matter. “After a court has spoken, the FCC is bound to follow that court’s mandate.” Iowa Utilities Bd., 135 F.3d at 540.

Although the facts discussed above are determinative here, we note briefly that, even without the Commission’s own statements conceding the point, it is quite evident that the loop-conditioning obligations contained in the Advanced Services Order do, in fact, require incumbents to provide new entrants with superior-quality access to network elements. As the Advanced Services Order itself makes plain, these conditioning obligations require incumbents to improve their facilities so that they can be used to provide services that the incumbents do not currently provide over those facilities. In particular, the Commission has specifically required each incumbent, at the request of a competitor, to take “affirmative steps” to improve its loops so that those loops may be used to provide advanced services even if the incumbent “does not itself offer advanced services over the loop.” Advanced Services Order ¶ 53. Put differently, the incumbents must create a “yet unbuilt superior” network that supports new services to be provided by the incumbent’s competitors. Iowa Utilities Board, 120 F.3d at 813. That is precisely what the Eighth Circuit has held the Commission may not require.

II. THE ADVANCED SERVICES ORDER MISAPPREHENDS THE SCOPE OF THE COMMISSION’S SECTION 706 FORBEARANCE AUTHORITY

The Advanced Services Order concludes that section 706 contains no independent grant of forbearance authority, but merely authorizes the Commission to use forbearance authority

granted in other sections of the Act. Advanced Services Order ¶ 69. To reach this conclusion, the Commission reasoned that any other construction would “eviscerate” the forbearance exclusions set forth in section 10(d). Id. ¶ 73. Accordingly, the Commission decided that section 706(a) simply gives it “an affirmative obligation to encourage the deployment of advanced services, relying on [its] authority established elsewhere in the Act.” Id. ¶ 74.

The Commission’s ruling reflects a fundamental misunderstanding of sections 10 and 706. Section 10(a) directs the Commission to forbear from regulating a telecommunications carrier or service if the Commission, applying a three-part test, determines that such regulation is no longer necessary to protect consumers. 47 U.S.C. § 160(a)(1)-(3). Section 10(d) limits the ability of the Commission to forbear from exercising this section 10(a) forbearance authority, stating:

Except as provided in section 251(f) of this title, the Commission may not forbear from applying the requirements of section 251(c) or 271 of this title under subsection (a) of this section until it determines that those requirements have been fully implemented.

47 U.S.C. § 160(d) (emphasis added). Thus, section 10(d), by its plain terms, limits only the Commission’s ability to exercise its forbearance authority under section 10(a). It nowhere restricts the Commission’s exercise of forbearance authority under any other section of the statute, including section 706, and it therefore provides no basis for the conclusion that section 706 is not an independent grant of forbearance authority.

The Commission’s Advanced Services Order neglects to explain how, given the express limitation of section 10(d)’s exclusions to “subsection (a) of this section,” it is possible for section 10(d)’s forbearance exclusions to extend to section 706. Indeed, without explanation, the

Commission has entirely read section 10(d)'s restricting language out of the provision, in violation of the black-letter principle that "a statute should be construed so as to give effect to each of its provisions." See, e.g., First Report and Order and Notice of Proposed Rulemaking, Implementation of Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as amended, 11 FCC Rcd 21905, 21981 [¶ 156] (1996). At the very least, the Commission must explain how it reached the conclusion it did, in light of the statute's plain language to the contrary.

In addition, the Commission's conclusion that the sole effect of section 706 is to give the agency an "affirmative obligation to encourage the deployment of advanced services," Advanced Services Order ¶ 74, essentially guts the forbearance obligations of section 706(a) of any meaning. Even without section 706, the 1996 Act requires the Commission to promote the deployment of advanced telecommunications technologies — indeed, implementation of this policy is one of the Act's principal objectives. See, e.g., Pub. L. No. 104-104, 110 Stat. 56 (1996) (stating that the purpose of the 1996 Act is to "promote competition and reduce regulation in order to secure lower prices and higher quality services for American telecommunications consumers and encourage the rapid deployment of new telecommunications technologies") (emphasis added). Congress thus had no need to enact section 706 simply to articulate a preference for the speedy deployment of an advanced telecommunications infrastructure. Again, by reading section 706 in a way that renders it redundant of other statutory provisions, the Commission has run afoul of a fundamental canon of statutory construction.

Not only is the Commission's interpretation of section 706 at odds with the structure of the statute, but also it fails to further Congress's pro-competitive policy objectives. The

Commission simply assumes — without even a sentence of analysis — that subjecting incumbent carriers' deployment of advanced services to the requirements of sections 251(c) and 271 will further the goal of opening the advanced services market to competition. See Advanced Services Order ¶ 76. But Congress designed sections 251(c) and 271 specifically to open to competition the markets for conventional local exchange service. Certainly, from the face of the statute, it is far from apparent that regulation intended to make these established markets competitive should automatically apply to the very different and emerging market for advanced services. Indeed, as numerous parties showed in their petitions and comments, imposing burdensome unbundling, resale, and separate-affiliate requirements on incumbent carriers' provision of advanced services will deter broadband deployment. See, e.g., Petition of Southwestern Bell Telephone Company, Pacific Bell & Nevada Bell, Southwestern Bell Telephone Company, Pacific Bell & Nevada Bell Petition for Relief from Regulation Pursuant to Section 706 of the Telecommunications Act of 1996 and 47 U.S.C. § 160 for ADSL Infrastructure and Service, 26-30; Bell Atlantic Reply Comments, Petition of Bell Atlantic Corp. for Relief from Barriers to Deployment of Advanced Telecommunications Service, Petition of U S WEST for Relief from Barriers to Deployment of Advanced Telecommunications Services, Petition of Ameritech Corp. to Remove Barriers to Investment in Advanced Telecommunications Technology, CC Dkt Nos. 98-11, 98-26, 98-32 at 24-25. The Commission must at least respond to these showings.

Section 706 imposes on the Commission an obligation to promote the deployment of advanced telecommunications services to all Americans, an obligation that is plainly distinct from section 10's mandate that the FCC forbear from enforcing regulation that is no longer necessary to protect consumers. To achieve its objective, section 706 directs the FCC to forbear

from imposing the requirements of the Act — including those set forth in sections 251(c) and 271 — on incumbent local exchange carriers, if such forbearance will encourage the development of broadband capabilities. The Commission's contrary interpretation is not supported by the 1996 Act, nor does it advance section 706's basic objective of making advanced telecommunications rapidly and widely available.

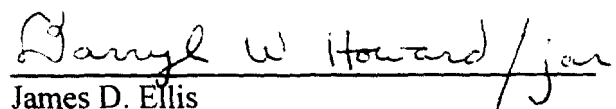
Accordingly, the Commission should reconsider both its determination that section 706 contains no separate grant of forbearance authority and its accompanying denial of petitioners' request for regulatory forbearance in this proceeding.

CONCLUSION

The Commission should (1) reconsider and vacate its order insofar as it imposes loop-conditioning obligations on incumbent LECs, and (2) reconsider its order insofar as it denies the petitions of Southwestern Bell Telephone Company, Pacific Bell, and Nevada Bell for relief from regulation pursuant to section 706.

Respectfully submitted,

Mark L. Evans
Sean A. Lev
Rebecca A. Beynon
KELLOGG, HUBER, HANSEN,
TODD & EVANS
1301 K Street, N.W.
Suite 1000 West
Washington, D.C. 20005


James D. Ellis
Robert M. Lynch
Durward D. Dupre
Darryl W. Howard
One Bell Center
Room 3528
St. Louis, MO 63101

*Counsel for SBC Communications Inc.,
Southwestern Bell Telephone Company,
Pacific Bell, and Nevada Bell*

CERTIFICATE OF SERVICE

I hereby certify that on this 8th day of September, 1998, I caused a copy of the Petition for Reconsideration of SBC Communications Inc., Southwestern Bell Telephone Company, Pacific Bell, and Nevada Bell, to be served on the individuals on the attached service list by first-class mail.

Darryl W. Howard / *per*
Darryl W. Howard

ITS INC
1231 20TH STREET
GROUND FLOOR
WASHINGTON, DC 20036

RICHARD TARANTO
FARR & TARANTO
BELL ATLANTIC
1850 M STREET NW
SUITE 1000
WASHINGTON DC 20036

ROBERT B MCKENNA
JEFFRY A BRUEGGEMAN
U S WEST INC
1020 19TH ST NW
WASHINGTON DC 20036

PIPER & MARBURY LLP
RONALD L PLESSER
MARK J O'CONNOR
STUART P INGIS
COUNSEL FOR COMMERCIAL INTERNET
EXCHANGE ASSOCIATION
SEVENTH FLOOR
1200 NINETEENTH ST NW
WASHINGTON DC 20036

BARTLETT L THOMAS
JAMES J VALENTINO
MINTZ LEVIN COHN FERRIS
GLOVSKY AND POPEO
COUNSEL FOR XCOM TECHNOLOGIES INC
701 PENNSYLVANIA AVE NW STE 900
WASHINGTON DC 20004-2608

JAMES R YOUNG
EDWARD D YOUNG III
MICHAEL E GLOVER
BELL ATLANTIC
1320 NORTH COURT HOUSE ROAD
8TH FLOOR
ARLINGTON VA 22201

JOHN T LENAHA
CHRISTOPHER HEIMANN
FRANK MICHAEL PANEK
GARY PHILLIPS
AMERITECH
2000 WEST AMERITECH CENTER DR
ROOM 4H84
HOFFMAN ESTATES IL 60196-1025

JANICE M MYLES
COMMON CARRIER BUREAU
FEDERAL COMMUNICATIONS COMMISSION
1919 M ST NW ROOM 544
WASHINGTON DC 20554

CHARLES C HUNTER
HUNTER COMMUNICATIONS LAW GROUP
COUNSEL FOR TELECOMMUNICATIONS
RESELLERS ASSOCIATION
1620 I STREET NW STE 701
WASHINGTON DC 20006

JONATHAN E CANIS
KELLEY DRYE & WARREN LLP
COUNSEL FOR INTERMEDIA
COMMUNICATIONS INC & EXCEL
TELECOMMUNICATIONS INC
1200 19TH ST NW STE 500
WASHINGTON DC 20544

CHRISTOPHER W SAVAGE
JAMES F IRELAND
COLE RAYWID & BRAVERMAN LLP
COUNSEL FOR APK NET LTD CYBER WARRIOR
HELICON ONLINE INFORAMP INTERNET
CONNECT COMPANY MTP LLC DBA JAVANET
& PROAXIS COMMUNICATIONS
1919 PENNSYLVANIA AVE NW STE 200
WASHINGTON DC 20006

JENNER & BLOCK
ANTHONY C EPSTEIN
COUNSEL FOR MCI TELECOMM CORP
601 THIRTEENTH STREET NW
WASHINGTON DC 20005

JONATHAN JACOB NADLER
SQUIRE SANDERS & DEMSEY
COUNSEL FOR INFORMATION TECHNOLOGY
ASSOCIATION OF AMERICA
1201 PENNSYLVANIA AVE NW
BOX 407
WASHINGTON DC 20044

HENRY GELLER
ALLIANCE FOR PUBLIC TECHNOLOGY
901 15TH ST NW STE 230
WASHINGTON DC 20005

NATIONAL ASSOCIATION OF COMMISSIONS
FOR WOMEN
1828 L STREET NW STE 250
WASHINGTON DC 20036

KECIA BONEY
DALE DIXON
LISA SMITH
MCI TELECOMMUNICATIONS CORPORATION
1801 PENNSYLVANIA AVE NW
WASHINGTON DC 20006

MCI COMMUNICATIONS
KEVIN SIEVERT
GLEN GROCHOWSKI
LOCAL NETWORK TECHNOLOGY
400 INTERNATIONAL PARKWAY
RICHARDSON TX 75081

LEON M KESTENBAUM
JAY C KEITHLEY
SPRINT CORPORATION
1850 M STREET NW
WASHINGTON DC 20036

UNITED HOMEOWNERS ASSOCIATION
1511 K STREET NW
WASHINGTON DC 20005

NATIONAL HISPANIC COUNCIL ON AGING
2713 ONTARIO ST NW
WASHINGTON DC 20009

NATIONAL ASSOCIATION OF
DEVELOPMENT ORGANIZATIONS
444 NORTH CAPITOL ST NW STE 630
WASHINGTON DC 20001

WORLD INSTITUTE ON DISABILITY
510 16TH ST STE 100
OAKLAND CA 94612

PETER ROHRBACH
LINDA L OLIVER
DAVID L SIERADZKI
HOGAN & HARTSON LLP
COUNSEL FOR LCI INTERNATIONAL TELECOM
CORP
COLUMBLA SQUARE
555 THIRTEENTH ST NW
WASHINGTON DC 20004

ANNE K BINGAMAN
DOUGLAS W KINKOPH
BOB MATHEW
LCI INTERNATIONAL CORP
8180 GREENSBORO DRIVE SUTTE 800
MCLEAN VA 22102

UNITED STATES TELEPHONE ASSOCIATION
LINDA KENT
KEITH TOWNSEND
1401 H STREET NW STE 600
WASHINGTON DC 20005

TERRENCE K FERGUSON
SR VP AND GENERAL COUNSEL
LEVEL 3 COMMUNICATIONS INC
3555 FARNAM STREET
OMAHA NE 68131

GAIL L POLIVY
GTE SERVICE CORPORATION
1850 M STREET NW
SUITE 1200
WASHINGTON DC 20036

RUSSELL M BLAU
RICHARD M RINDLER
SWIDLER & BERLIN CHTD
COUNSEL FOR FOCAL COMMUNICATIONS CORP
HYPERION TELECOMMUNICATIONS INC
KMC TELECOM INC AND MCLEODUSA INC
3000 K ST NW STE 300
WASHINGTON DC 20007

COLLEEN BOOTHBY
LEVIN BLASZAK BLOCK AND
BOOTHBY LLP
COUNSEL FOR THE INTERNET ACCESS
COALITION
2001 L STREET NW STE 900
WASHINGTON DC 20036

DAVID N PORTER
WORLD COM INC
1120 CONNECTICUT AVE NW
STE 400
WASHINGTON DC 20036

RANDALL B LOWE
PIPER & MARBURY LLP
COUNSEL FOR
TRANSWIRE COMMUNICATIONS LLC
1200 NINETEENTH ST NW
WASHINGTON DC

THOMAS M KOUTSKY
ASSISTANT GENERAL COUNSEL
COVAD COMMUNICATIONS COMPANY
35670 BASSETT STREET
SANTA CLARA CA 95054

GENEVIEVE MORELLI
EXECUTIVE VP AND GENERAL COUNSEL
THE COMPETITIVE TELECOMMUNICATIONS
ASSOCIATION
1900 M STREET NW STE 800
WASHINGTON DC 20036

MARK C ROSENBLUM
AVA B KLEINMAN
AT&T CORP
295 NORTH MAPLE AVENUE
ROOM 3252J1
BASKING RIDGE NJ 07920

RICHARD D MARKS ESQ
VINSON & ELKINS LLP
COUNSEL FOR COMPUTER &
COMMUNICATIONS INDUSTRY
ASSOCIATION
1455 PENNSYLVANIA AVE NW
SUITE 700
WASHINGTON DC 20004-1008

M ROBERT SUTHERLAND
BELL SOUTH CORPORATION
1155 PEACHTREE ST NE
ATLANTA GA 30309-3610

J MANNING LEE
VICE PRESIDENT REGULATORY AFFAIRS
TELEPORT COMMUNICATIONS GROUP INC
TWO TELEPORT DRIVE
STATEN ISLAND NY 10311

GEORGE VRADENBURG III
AMERICA ONLINE INC
1101 CONNECTICUT AVE NW
STE 400
WASHINGTON DC 20036

CHERYL L PARRINO
CHAIRMAN
PUBLIC SERVICE COMMISSION OF WISCONSIN
P O BOX 7854
MADISON WI 53707-7854

G RICHARD KLEIN
COMMISSIONER
INDIANA UTILITY REGULATORY COMMISSION
302 W WASHINGTON STE E-306
INDIANAPOLIS IN 46204

JEFFREY A CAMPBELL
STACEY STERN ALBERT
COMPAQ COMPUTER CORPORATION
1300 I STREET NW
WASHINGTON DC 20005

MARK J TAUBER
TERESA S WERNER
PIPER & MARBURY LLP
COUNSEL FOR OMNIPOINT COMMUNICATIONS
INC
1200 19TH ST NW SEVENTH FLOOR
WASHINGTON DC 20036

RILEY M MURPHY
AMERICAN COMMUNICATIONS SERVICES INC
131 NATIONAL BUSINESS PARKWAY
STE 100
ANNAPOLIS JUNCTION MD 20701

STEVEN GOROSH
VICE PRESIDENT & GENERAL COUNSEL
NORTHPOINT COMMUNICATIONS INC
222 SUTTER STREET
SAN FRANCISCO CA 94108

JEFFREY BLUMENFELD
CHRISTY KUNIN
BLUMENFELD & COHEN
COUNSEL FOR RHYTHMS NETCONNECTIONS
INC
1615 M STREET NW STE 700
WASHINGTON DC 20036

CEDAR CITY/IRON COUNTY ECONOMIC DEV
110 N MAIN STSREET
P O BOX 249
CEDAR CITY UTAH 84720

MINTZ LEVIN COHN FERRIS GLOVSKY AND POPEO
HOWARD J SYMONS
MICHELLE M MUNDT
COUNSEL FOR NEXTLINK COMMUNICATIONS INC
701 PENNSYLVANIA AVENUE NW
SUITE 900
WASHINGTON DC 20004

NEXTLINK COMMUNICATIONS INC
R GERARD SALEMME
SENIOR VICE PRESIDENT EXTERNAL AFFAIRS AND
INDUSTRY RELATIONS
DANIEL GONZALEZ
DIRECTOR REGULATORY AFFAIRS
1730 RHODE ISLAND AVE NW
SUITE 1000
WASHINGTON DC 20036

GORDON M AMBACH
EXECUTIVE DIRECTOR
COUNCIL OF CHIEF STATE SCHOOL OFFICERS
ONE MASSACHUSETTS AVE NW
SUITE 700
WASHINGTON DC

HALPRIN TEMPLE GOODMAN & SUGRUE
THOMAS J SUGRUE
COUNSEL FOR NYSERNET
1100 NEW YORK AVENUE NW
SUITE 650 EAST
WASHINGTON DC 20005

NYSERNET INC
DR DAVID LYTEL
125 ELWOOD DAVIS ROAD
SYRACUSE NY 13212

BLUMENFELD & COHEN
JEFFREY BLUMENFELD
CHRISTY C KUNIN
MICHAEL D SPECHT
ACCESS TELECOMMUNICATIONS ALLIANCE
1615 M STREET NW SUITE 700
WASHINGTON DC 20036

STEVEN GOROSH
VICE PRESIDENT & GENERAL COUNSEL
NORTHPOINT COMMUNICATIONS INC
222 SUTTER STREET
SAN FRANCISCO CA 94108

COLE RAYWID & BRAVERMAN LLP
CHRISTOPHER W SAVAGE
JAMES F IRELAND
KARLYN D STANLEY
1919 PENNSYLVANIA AVENUE NW
SUITE 200
WASHINGTON DC 20006

JOSEPH W WAZ JR
VICE PRESIDENT EXTERNAL AFFAIRS &
PUBLIC POLICY COUNSEL
COMCAST CORPORATION
1500 MARKET STREET
PHILADELPHIA PA 19102

JAMES R COLTHARP
SENIOR DIRECTOR PUBLIC POLICY
COMCAST CORPORATION
1317 F STREET NW
WASHINGTON DC 20004

CHARLES D GRAY
GENERAL COUNSEL
NARUC
1100 PENNSYLVANIA AVE STE 608
P O BOX 684
WASHINGTON DC 20044

ALBERT H KRAMER
MICHAEL CAROWITZ
DICKSTEIN SHAPIRO MORIN &
OSHINSKY LLP
COUNSEL FOR ICG TELECOM GROUP INC
2101 L STREET NW
WASHINGTON DC 20037-1526

D ROBERT WEBSTER
BAMBERGER & FEIBLEMAN
COUNSEL FOR THE NATIONAL BLACK
CHAMBER OF COMMERCE
54 MONUMENT CIRCLE STE 600
INDIANAPOLIS IN 46204

CHAPIN BURKS
PRESIDENT
ST GEORGE AREA CHAMBER OF COMMERCE
97 EAST ST GEORGE BLVD
ST GEORGE UTAH 84770

JOEL BERNSTEIN
HALPRIN TEMPLE GOODMAN &
SUGRUE
COUNSEL FOR NEXT LEVEL COMMUNICATIONS
1100 NEW YORK AVE NW
SUITE 650 EAST
WASHINGTON DC 20005

C BENNETT LEWIS
EXECUTIVE DIRECTOR
AURORA CHAMBER OF COMMERCE
3131 SOUTH VAUGNWAY STE 426
AURORA CO 80014

CHRISTOPHER J WHITE
DEPUTY ASSISTANT RATEPAYER ADVOCATE
THE STATE OF NEW JERSEY
DIVISION OF THE RATEPAYER ADVOCATE
31 CLINTON STREET 11 FLOOR
NEWARK NJ 07101

JEFFREY BLUMENFELD
CHRISTY KUNIN
BLUMENFELD & COHEN
1615 M STREET NW STE 700
WASHINGTON DC 20036

JOHN HANES
CHAIRMAN
HOUSE CORPORATION
WYOMING STATE LEGISLATURE
213 STATE CAPITOL
CHEYENNE WY 82008

THOMAS GANN
MANAGER FEDERAL AFFAIRS
SUN MICROSYSTEMS INC
1300 I STREET NW STE 420 EAST
WASHINGTON DC 20005

CHERIE R KISER
MICHAEL B BRESSMAN
MINTZ LEVIN COHN FERRIS
GLOVSKY AND POPEO PC
701 PENNSYLVANIA AVE NW
STE 900
WASHINGTON DC 20004

ROBERT D BOYSEH
PRESIDENT
LARAMIE ECONOMIC DEVELOPMENT CORP
1482 COMMERCE DRIVE STE A
LARAMIE WY 82070

JACK CREWS
CHEYENNE LEADS
1720 CAREY AVENUE STE 401
P O BOX 1045
CHEYENNE WY 82003-1045

KAREN PELTZ STRAUSS
LEGAL COUNSEL FOR TELECOMMUNICATIONS
POLICY
NATIONAL ASSOCIATION FOR THE DEAF
814 THAYER AVE
SILVER SPRING MD 20910-4500

RODNEY L JOYCE
J THOMAS NOLAN
SHOOK HARDY & BACON
COUNSEL FOR NETWORK ACCESS SOLUTIONS
INC
801 PENNSYLVANIA AVENUE NW
WASHINGTON DC 20004-2615

NATIONAL ASSOCIATION OF DEVELOPMENT
ORGANIZATIONS
444 NORTH CAPITOL STREET NW STE 630
WASHINGTON DC 20001

JEFFREY BLUMENFED
CHRISTY KUNIN
COUNSEL FOR DSL ACCESS
TELECOMMUNICATIONS ALLIANCE
1615 M STREET NW STE 700
WASHINGTON DC 20036

SCOTT TRUMAN
EXECUTIVE DIRECTOR
UTAH RURAL DEVELOPMENT COUNCIL
ADMINISTRATION BUILDING 304
SOUTHERN UTAH UNIVERSITY
CEDAR CITY UT 84720

RONALD L PLESSER
PIPER & MARBURY LLP
COUNSEL FOR PSINET
1200 NINETEENTH ST NW
WASHINGTON DC 20036

THOMAS J DUNLEAVY
NEW YORK DEPARTMENT OF PUBLIC SERVICE
THREE EMPIRE STATE PLAZA
ALBANY NY 12223-1350

A DANIEL SCHEINMAN
LAURA K IPSEN
CISCO SYSTEMS INC
170 WEST TASMAN DRIVE
SAN JOSE CA 95134-1706

GERALD STEVENS-KITTNER
CAI WIRELESS SYSTEMS INC
2101 WILSON BOULEVARD STE 100
ARLINGTON VA 22201

JOHN WINDHAUSEN JR
GENERAL COUNSEL
COMPETITION POLICY INSTITUTE
1156 15TH ST NW STE 310
WASHINGTON DC 20005

WILLIAM J ROONEY JR
GLOBAL NAPS INC
TEN WINTHROP SQUARE
BOSTON MA 02110

RUSSELL STAIGER
BISMARK/MANDAN DEVELOPMENT ASSN
400 E BROADWAY AVE STE 417
BISMARK ND 58502

J JEFREY OXLEY
MINNESOTA DEPARTMENT OF PUBLIC
SERVICE
1200 NCL TOWER
445 MINNESOTA STREET
ST PAUL MN 55101-2130

JOSEPH K WITMER
PENNSYLVANIA PUBLIC UTILITY COMMISSION
P O BOX 3265
COMMONWEALTH AVE & NORTH
ROOM 116
HARRISBURG PA 17105-3265

THOMAS HATCH
HOUSE OF REPRESENTATIVES
STATE OF UTAH
P O BOX 391
PANGUITCH UT 84759

ISSUE DYNAMICS INC
901 15TH STREET STE 230
WASHINGTON DC 20005

ECONOMIC STRATEGY INSTITUTE
1401 H STREET NW
SUITE 750
WASHINGTON DC 20005

ELLEN DEUTSCH
SENIOR COUNSEL
ELECTRIC LIGHTWAVE INC
8100 NE PARKWAY DRIVE
SUITE 200
VANCOUVER WA 98662

ELECTRIC LIGHTWAVE INC
LEGAL COUNSEL
4400 77TH AVE
VANCOUVER WA 98662

NATIONAL ASSOCIATION OF COMMUNITY
ACTION AGENCIES
1100 17TH ST NW STE 500
WASHINGTON DC 20036

GENE VUCKOVICH
EXECUTIVE DIRECTOR
MONTANA RURAL DEVELOPMENT PARTNERS
115 E SEVENTH STREET SUITE 2A
ANACONDA MT 59711

ITS INC.
1231 20TH STREET NW
GROUND FLOOR
WASHINGTON DC 20036

JANICE M MYLES
COMMON CARRIER BUREAU
FCC
1919 M STREET NW RM 544
WASHINGTON DC 20554

WILLIAM E KENNARD
CHAIRMAN
FEDERAL COMMUNICATIONS COMMISSION
1919 M STREET NW ROOM 814
WASHINGTON DC 20

SUSAN NESS
COMMISSIONER
FEDERAL COMMUNICATIONS COMMISSION
1919 M STREET NEW ROOM 832
WASHINGTON DC 20554

HAROLD FURCHGOTT-ROTH
COMMISSIONER
1919 M ST NW ROOM 802
WASHINGTON DC 20554

MICHAEL K POWELL
COMMISSIONER
FEDERAL COMMUNICATIONS COMMISSION
1919 M STREET NW ROOM 844
WASHINGTON DC 20554

GLORIA TRISTANI
COMMISSIONER
FEDERAL COMMUNICATIONS COMMISSION
1919 M ST NW ROOM 826
WASHINGTON DC 20554

MARK C ROSENBLUM
AT&T CORP
295 NORTH MAPLE AVE
ROOM 5460C2
BASKING RIDGE NJ 07920

J MANNING LEE
TELEPORT COMMUNICATIONS GROUP INC
TWO TELEPORT DRIVE STE 300
STATEN ISLAND NY 10311

GENEVIEVE MORELLI
EXECUTIVE VICE PRESIDENT
AND GENERAL COUNSEL
COMPETITIVE
TELECOMMUNICATIONS ASSOCIATION
1900 M STREET NW SUITE 800
WASHINGTON DC 20036

GENEVIEVE MORELLI
EXECUTIVE VICE PRESIDENT
AND GENERAL COUNSEL
COMPETITIVE TELECOMMUNICATIONS
ASSOCIATION
1900 M STREET NW SUITE 800
WASHINGTON DC 20036

RILEY M MURPHY
VICE PRESIDENT AND GENERAL COUNSEL
E.SPIRE COMMUNICATIONS INC
131 NATIONAL BUSINESS PARKWAY
SUITE 100
ANNAPOLIS JUNCTION MD 20701

BRAD E MUTSCHELKNAUS
MARIEANN Z MACHIDA
KELLEY DRYE & WARREN LLP
1200 19TH STREET NW
SUITE 500
WASHINGTON DC 20036

CATHERINE R SLOAN
RICHARD L FRUCHTERMAN III
RICHARD S WHITT
WORLD.COM INC
1120 CONNECTICUT AVE NW
SUITE 400
WASHINGTON DC 20036

BARBARA A DOOLEY
EXECUTIVE DIRECTOR
COMMERCIAL INTERNET eXchange ASSOC
1041 STERLING ROAD
SUITE 104A
HERNDON VA 20170

JONATHAN E CANIS
ERIN M REILLY
KELLEY DRYE & WARREN LLP
COUNSEL FOR INTERMEDIA
COMMUNICATIONS INC
1200 19TH ST NW STE 500
WASHINGTON DC 20554

KEITH TOWNSEND
UNITED STATES TELEPHONE ASSOCIATION
1401 H STREET NW STE 600
WASHINGTON DC 20005

ROBERT W MCCAUSLAND
VICE PRESIDENT REGULATORY AND
INTERCONNECTION ALLEGIANCE TELECOM
1950 STEMMONS FREEWAY STE 3026
DALLAS TX 75207-3118

STEVEN GOROSH
VICE PRESIDENT & GENERAL COUNSEL
NORTHPOINT COMMUNICATIONS INC
222 SUTTER STREET
SAN FRANCISCO CA 94108

KEVIN TIMPANE
VICE PRESIDENT PUBLIC POLICY
FIRSTWORLD COMMUNICATIONS INC
9333 GENESSEE AVENUE STE 200
SAN DIEGO CA 92121

JEFFREY BLUMENFELD
CHRISTY C KUNIN
COUNSEL FOR RHYTHMS
NETCONNECTIONS INC
1615 M STREET NW STE 700
WASHINGTON DC 20036

PETER A ROHRBACH
LINDA L OLIVER
HOGAN & HARTSON LLP
COUNSEL FOR LCI INTERNATIONAL TELECOM
CORP
555 THIRTEENTH ST NW
WASHINGTON DC 20004

ANNE K BINGAMAN
DOUGLAS W KINKOPH
LCI INTERNATIONAL TELECOM CORP
8180 GREENSBORO DRIVE SUITE 800
MCLEAN VA 22102

DAVID J NEWBURGER
NEWBURGER & VOSSMEYER
COUNSEL FOR CAMPAIGN FOR
TELECOMMUNICATIONS ACCESS
ONE METROPOLITAN SQUARE
SUITE 2400
ST LOUIS MO 63102

GAIL L POLIVY
GTE SERVICE CORPORATION
1850 M STREET NW
WASHINGTON DC 20036

CHARLES C HUNTER
CATHERINE M HANNAN
HUNTER COMMUNICATIONS LAW GROUP
COUNSEL FOR TELECOMMUNICATIONS
RESELLERS ASSOCIATION
1620 I STREET NW STE 701
WASHINGTON DC 20006

LEON M KENSTENBAUM
JAY C KEITHLEY
SPRINT CORPORATION
1850 M STREET NW 11TH FLOOR
WASHINGTON DC 20036

ALBERT H KRAMER
MICHAEL CAROWITZ
DICKSTEIN SHAPIRO MORIN &
OSHINSKY LLP
COUNSEL FOR ICG TELECOM GROUP INC
2101 L STREET NW
WASHINGTON DC 20037-1526

CINDY Z SCHONHAUT
SENIOR VICE PRESIDENT OF GOVERNMENT
AFFAIRS & EXTERNAL AFFAIRS
ICG COMMUNICATIONS INC
161 INVERNESS DRIVE
ENGLEWOOD CO 80112

KECIA BONEY
DALE DIXON
MCI TELECOMMUNICATIONS CORP
1801 PENNSYLVANIA AVE NW
WASHINGTON DC 20006

ANTHONY C EPSTEIN
JENNER & BLOCK
601 THIRTEENTH STREET
12TH FLOOR SOUTH
WASHINGTON DC 20005

KEVIN SIEVERT
GLEN GROCHOWSKI
MCI COMMUNICATIONS
LOCAL NETWORK TECHNOLOGY
400 INTERNATIONAL PKWY
RICHARDSON TX 75081

W SCOTT MCCOLLOUGH
MCCOLLOUGH AND ASSOCIATES PC
1801 NORTH LAMAR STE 104
AUSTIN TX 78701

DANA FRIX
KEMAL M HAWA
SWIDLER & BERLIN CHTD
COUNSEL FOR HYPERION
TELECOMMUNICATIONS INC
3000 K STREET NW STE 300
WASHINGTON DC 20007-5116

RUSSELL M BLAU
SWIDLER & BERLIN CHTD
COUNSEL FOR KMC TELECOM INC
3000 K STREET NW STE 300
WASHINGTON DC 20007

STEVEN M HOFFER
COALITION REPRESENTING INTERNET
SERVICE PROVIDERS
95 MARINER GREEN DR
CORTE MADERA CA 94925

M ROBERT SUTHERLAND
STEPHEN L EARNEST
BELLSOUTH CORPORATION
1155 PEACHTREE ST NE
STE 1700
ATLANTA GA 30309-3610

THOMAS M KOUTSKY
ASSISTANT GENERAL COUNSEL
COVAD COMMUNICATIONS COMPANY
6849 OLD DOMINION DRIVE SUITE 220
MCLEAN VA 22101

FRANK MICHAEL PANEK
AMERITECH
2000 W AMERITECH CENTER DRIVE
ROOM 4H84
HOFFMAN ESTATES IL 60196

LAWRENCE G MALONE
GENERAL COUNSEL
STATE OF NEW YORK DEPARTMENT OF
PUBLIC SERVICE
THREE EMPIRE STATE PLAZA
ALBANY NY 12223-1350

L MARIE GUILLORY
NATIONAL TELEPHONE COOPERATIVE
ASSOCIATION
2626 PENNSYLVANIA AVE NW
WASHINGTON DC 20037

CHRISTOPER W SAVAGE
COLE RAYWID & BRAVERMAN
COUNSEL FOR COMCAST CORPORATION
1919 PENNSYLVANIA AVE NW STE 200
WASHINGTON DC 20006

RILEY M MURPHY
VICE PRESIDENT AND GENERAL COUNSEL
E.SPIRE COMMUNICATIONS INC
131 NATIONAL BUSINESS PARKWAY
SUITE 100
ANNAPOLIS JUNCTION MD 20701

ROBERT W MCCAUSLAND
VICE PRESIDENT REGULATORY AND
INTERCONNECTION
ALLEGIANCE TELECOM INC
1950 STEMMON FREEWAY STE 3026
DALLAS TX 75207-3118

CHARLES C HUNTER
CATHERINE M HANNAN
HUNTER COMMUNICATIONS LAW GROUP
1620 I STREET NW STE 701
WASHINGTON DC 20006

PETER ARTH JR
WILLIAM N FOLEY
MARY MACK ADU
505 VAN NESS AVE
SAN FRANCISCO CA 94102

INTERNATIONAL TRANSCRIPTION
SERVICES INC
1231 20TH STREET NW
WASHINGTON DC 20036

COMPETITIVE PRICING DIVISION
FEDERAL COMMUNICATIONS COMMISSION
1919 M STREET NW - RM 518
WASHINGTON DC 20554

MAUREEN LEWIS
GENERAL COUNSEL
ALLIANCE FOR PUBLIC TECHNOLOGY
901 15TH ST NW STE 230
WASHINGTON DC 20038-7146

MARK C ROSENBLUM
AVA B KLEINMAN
AT&T
295 NORTH MAPLE AVE
RM 3252J1
BASKING RIDGE NJ 07920

ROBERT B MCKENNA
U S WEST COMMUNICATIONS INC
1020 19TH ST NW STE 700
WASHINGTON DC 20036

FRANK MICHAEL PANEK
AMERITECH
2000 WEST AMERITECH CENTER DR
ROOM 4H84
HOFFMAN ESTATES IL 60196-1025

RONALD L PLESSER
MARK J O CONNOR
PIPER & MARBURY LLP
COUNSEL FOR COMMERCIAL INTERNET
EXCHANGE ASSOCIATION
1200 NINETEENTH ST NW
WASHINGTON DC 20036

ECONOMIC STRATEGY INSTITUTE
1401 H ST NW STE 750
WASHINGTON DC 20005

ANGELA LEDFORD
KEEP AMERICA CONNECTED!
P O BOX 27911
WASHINGTON DC 20005

PETER A ROHRBACH
LINDA L OLIVER
HOGAN & HARTSON LLP
COUNSEL FOR LCI INTERNATIONAL CORP
555 THIRTEENTH ST NW
WASHINGTON DC 20004